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**From:** Bartley, Richard [Bartley.Richard@epa.gov]  
**Sent:** 7/20/2020 2:54:53 PM  
**To:** Donaldson, Guy [Donaldson.Guy@epa.gov]  
**Subject:** RE: Inside EPA: In Blow To EPA, Same D.C. Circuit Panel Will Hear 'SIP Call' Air Cases

Fake news highlighted below.

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**From:** Donaldson, Guy <Donaldson.Guy@epa.gov>  
**Sent:** Monday, July 20, 2020 9:48 AM  
**To:** Shar, Alan <shar.alan@epa.gov>; Bartley, Richard <Bartley.Richard@epa.gov>  
**Subject:** FW: Inside EPA: In Blow To EPA, Same D.C. Circuit Panel Will Hear 'SIP Call' Air Cases

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**From:** Casso, Ruben <Casso.Ruben@epa.gov>  
**Sent:** Monday, July 20, 2020 9:41 AM  
**To:** Donaldson, Guy <Donaldson.Guy@epa.gov>; Feldman, Michael <Feldman.Michael@epa.gov>  
**Subject:** Inside EPA: In Blow To EPA, Same D.C. Circuit Panel Will Hear 'SIP Call' Air Cases

<https://insideepa.com/daily-news/blow-epa-same-dc-circuit-panel-will-hear-%E2%80%98sip-call%E2%80%99-air-cases>

## In Blow To EPA, Same D.C. Circuit Panel Will Hear 'SIP Call' Air Cases

July 17, 2020

A key appeals court will hear cases challenging EPA's decisions allowing Texas and North Carolina to give industry air rule exemptions during periods of startup, shutdown or malfunction (SSM) when it hears older litigation over national SSM policy, increasing the likelihood of a nationally binding adverse ruling for the agency.

In July 16 orders, the U.S. Court of Appeals for the District of Columbia Circuit said the same merits panel of the court, on the same day, will hear not only environmentalists' cases challenging the Texas and North Carolina exemptions, but also an older appeal of EPA's 2015 "SIP Call" rule that required 36 states to remove SSM exemptions from their state implementation plans (SIPs) for attaining federal air quality standards.

In a per curiam order in *Environmental Committee of the Florida Electric Power Coordinating Group, Inc., v. EPA, et al.*, the national SIP Call suit, Judges David Tatel, Thomas Griffith and Patricia Millett say a yet-to-be-named panel will hear all three suits on the same day. The court declined, however, to consolidate the cases, as environmentalists sought.

Also, the court will wait for EPA to finish its long-running reconsideration of national SSM policy before deciding any of the suits, which could allow for further state-specific exclusions from the SIP Call in the interim. A second order by the same panel, in the Texas suit *Sierra Club, et al. v. EPA, et al.*, directs parties to proceed with briefing, and to include their venue arguments in briefs for the future panel. The Texas and North Carolina cases will be held in abeyance after the conclusion of briefing, pending EPA action on the national SSM policy.

Environmental groups say EPA is dismantling the Obama-era SIP Call piecemeal, allowing Texas and North Carolina to escape it, and that the agency is also proposing to do so for Iowa. The groups say EPA's decisions alter a national regulation and change national policy, and as such their cases must be heard in the D.C. Circuit, which has jurisdiction over actions that are "nationally applicable" or declared by EPA to have "nationwide scope or effect."

In excluding states from the SIP Call one by one and keeping litigation in regional appeals courts, the environmentalists charge, the agency is deliberately hoping to evade D.C. Circuit review. EPA's 2015 SIP Call required states to remove SSM exemptions because the Obama administration interpreted D.C. Circuit precedent as requiring this. The court in 2008 found that SSM exemptions are unlawful in federal regulations because emissions standards must apply at all times. It then in 2014 found "affirmative defenses" unlawful in EPA air regulations as well. Such defenses shield facilities from civil liability in the event of unplanned "upset" emissions in excess of permit limits.

### **EPA Arguments**

But the Trump EPA in its Texas and North Carolina decisions rejected this logic, arguing the waivers are acceptable in SIPs even though they are barred in EPA air rules.

At the same time, EPA argues these decisions for individual states are local or regional in scope, and that its national SIP Call remains under agency review -- and therefore still in effect.

In *Sierra Club*, environmentalists say EPA unlawfully dropped the SIP Call with respect to Texas, allowing industry in the state to use an affirmative defense. Parallel litigation by environmentalists against the Texas SIP remains in abeyance in the 5th Circuit, pending the D.C. Circuit's resolution of the venue question.

Environmentalists' lawsuit against SSM exemptions in North Carolina, also styled *Sierra Club, et al. v. EPA, et al.*, similarly challenges EPA's decision to exclude that state from the national SIP Call.

In the Texas suit, EPA has fought to have the D.C. Circuit case transferred to the 5th Circuit, which can issue binding rulings only for Louisiana, Mississippi and Texas. The 5th Circuit has also previously upheld a Texas affirmative defense provision. In the North Carolina suit, filed more recently, briefing has not yet advanced as far.

The D.C. Circuit in its July 16 orders again holds the Environmental Committee suit in abeyance, pending EPA's decision on its national SSM policy.

However, this allows EPA to continue its reconsideration of the SIP Call policy, and the agency has so far been in no hurry to complete its review. Perhaps anticipating further delay, the court directs EPA "in its status reports, to identify the steps it has taken in its review of the SSM Action, the steps that remain to be taken, and an estimate of when it anticipates completing its review.